No. 13122

United States Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA and R. P. JANDL, as Administrator of the Estate of William F. Leland, Deceased, and C. W. BREAKIRON, Successor Receiver for Atlantic and Pacific Airlines, *Appellants*,

vs.

EAGLE STAR INSURANCE COMPANY, LIMITED; ORION INSURANCE COMPANY, LIMITED; THE DRAKE INSURANCE COMPANY, LIMITED, subscribing underwriting members of Lloyd's, London, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLEES' REQUEST FOR LEAVE TO FILE ARGUMENT IN ANSWER TO ARGUMENT IN APPELLANTS' PETITION FOR REHEARING

and

APPELLEES' ANSWER TO ARGUMENT CONTAINED IN APPELLANTS' PETITION FOR REHEARING

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In view of the fact that Appellants have made an extensive argument in their petition for rehearing, Appellees request leave of the court to answer the argument contained in the petition for rehearing.

Respectfully requested,

MACBRIDE, MATTHEWS & HANIFY,
Attorneys for Appellees.

United States Court of Appeals

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APPELLEES' ANSWER TO ARGUMENT CONTAINED IN APPELLANTS' PETITION FOR REHEARING

Appellants' argument on their petition for rehearing, when shorn of the impressive sounding verbiage with which it is submitted, amounts to merely this:

1. The sentence of the Court's opinion reading: "That decision appears to be in line with what we might call a 'literal' construction of insurance policies which appears to be the established rule of the State of Washington" *when read out of context*, could be read as a holding by this court

that the Washington Court will give even an ambiguously worded policy a 'literal' construction.

2. By assuming, contrary to the plain wording of Condition 3 of the policy, that it relates to nothing but mitigation of damages or by making a minimum amount of change in the wording so as to make it clumsy, awkward, repititious and ambiguous, the assured could avoid the consequences of his flagrant negligence and have a construction of such a policy as would permit him to recover for the loss of his airplane.

Appellants, in connection with their first argument, do not contend and cannot contend, in view of the many Washington cases, that the Washington Court does not hold steadfast to the rule announced in the cases of *Isaacson Iron Works v. Ocean Acc. Etc. Corp.*, 191 Wash. 221, 70 P.(2d) 1026 and *Hamilton Trucking Service v. Automobile Ins. Co.*, 39 Wn.(2d) 688, 237 P.(2d) 781, that it *will not permit* the rule requiring construction of insurance policies in favor of the assured to have the effect of *making a plain agreement* ambiguous and then interpret the policy in favor of the assured.

Some of the cases announcing and applying this rule are:

Green v. National Casualty Co., 87 Wash. 237, 151 Pac. 509;

Menger v. Inland Empire, Etc. Ins. Co., 118 Wash. 514, 203 Pac. 934;

Miller v. Penn Mutual Life Ins. Co., 189 Wash. 269, 64 P.(2d) 1050;

Maylon v. Ocean Acc. & Guar. Corp., 149 Wash. 70, 270 Pac. 96;

Handley v. Oakley, 10 Wn.(2d) 396, 116 P. (2d) 833;

Kane v. Order of United Com. Travelers, 3 Wn.(2d) 355, 100 P.(2d) 1036;

Associated Indemnity Corp. v. Waschsmith, 2 Wn.(2d) 679, 99 P.(2d) 420;

Evans v. Metropolitan Life Ins. Co., 26 Wn. (2d) 594, 174 P.(2d) 961.

Thus, in the last cited case, the court said:

"It is self-evident that (1) an insurance policy is merely a written contract between an insurer and an insured; (2) courts cannot rule out of the contract any language which the parties thereto have put into it; (3) a court is not at liberty to revise a contract under the theory of construing it; (4) neither abstract justice, nor any rule of construction, justifies the creation of a contract for the parties which they did not make themselves, or the imposition upon one party to a contract of an obligation not therein by him assumed. The words and terms as used in the contracts must be construed in their ordinary and popular sense."

In *Miller v. Penn Mutual Life Ins. Co.*, 189 Wash. 269, 64 P.(2d) 1050, the court said:

"Appellant vigorously contends that the insurance contract is ambiguous, but constitutes an entire and single contract, and as such should be construed most favorably in favor of the insured, citing *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 83 Pac. 113, 4 L.R.A. (N.S.) 636; *Algoe v. Pacific Mutual Life Ins. Co.*, 91 Wash. 324, 157 Pac. 993, L.R.A. 1917A, 1327; *Guaranty Trust Co. v. Continental Life Ins. Co.*, 159 Wash. 683,

294 Pac. 585; *Brown v. Northwestern Mutual Fire Association*, 176 Wash. 693, 30 P.(2d) 640; *Braley Motor Co. v. Northwest Casualty Co.*, 184 Wash. 47, 49 P.(2d) 911; Restatement of the Law of Contracts, Sec. 236; 32 C.J. 1152-1156, and 1303.

"The rule that the contract will be construed most favorably to the insured will be applied only when there is an unexplained ambiguity in the language of the contract. It is well settled that all parts of an insurance policy must, if possible, be harmonized and given effect. *Aetna Ins. Co. v. Sacramento-Stockton S.S. Co.*, 273 Fed. 55; 2 Cooley's Briefs on Insurance (2d ed.) 999.

"The liability of respondent is fixed by the terms of the contract, and its terms, if plain and free from ambiguity, must control. *Puget Sound Improvement Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 52 Wash. 124, 100 Pac. 190.

"In thus construing the policy we are not unmindful of the rule that policies are construed in favor of the insured and most strongly against the insurer, as held in *Starr v. Aetna Life Ins. Co.*, *supra*, but this rule should not be permitted to have the effect to make a plain agreement ambiguous and then interpret it in favor of an insured. *Green v. National Casualty Co.*, 87 Wash. 237, 151 Pac. 509, and cases cited."

In the sense that the Washington Court has uniformly refused to find ambiguity where the sense and meaning of the terms used in a policy are clear and unambiguous and has uniformly given such terms their *plain meaning*, that court does follow a rule of

"literal" construction. As the *Hamilton Trucking* case illustrates, the court has been unwilling to follow the decisions of other courts that specific policy language *is ambiguous*. We submit that it will be apparent to the ordinary reader of this court's opinion that it was in this sense that it was said that the Washington court follows what *might be called* a "literal" rule of construction of insurance policies.

Appellants have not, in connection with their second argument, or at any time earlier in the case suggested how Condition 3 of the policy is in any way ambiguous or uncertain of meaning. They have at no time cited a single case construing or interpreting language similar to that used in Condition 3, either in the way they say it should be interpreted or which in any way touches upon the interpretation that should be given such language. If it be true, as asserted by Appellants on page 2 of their petition for rehearing, that Condition 3 is a condition of a kind commonly found in insurance policies, it is a *striking circumstance* that they are unable to cite any case interpreting such a condition as they say it should be interpreted or in some manner touching on the subject.

The plain fact is, as pointed out in the many cases cited in our brief (pp. 18 to 30) that the courts have uniformly held, as this court did in its opinion, that the language of the condition is not uncertain or ambiguous and prevents an assured from recovering for damages caused by his negligence.

This leads us to a more particular examination of Appellants' arguments in their petition for rehearing.

Answer to Appellants' Argument that the Court Decided an Important Question of Local Law in a Way that Probably Is in Conflict with Applicable Local Decisions.

Under the heading "Scope and Basis of Decision" Appellants assert, at page 2 of their petition for rehearing, that this court construed Condition 3 out of context and then quote Section 1 of the policy only, and state that the court does not suggest or Appellees contend that this clause does not cover the loss sustained. *Out of context* the quoted Section 1 would cover the loss but as the court's opinion notes "*The Appellees' undertaking to insure was 'subject to the terms, conditions and limitations' contained and set forth in the policy or certificate.*" There are many exclusions and conditions placed upon the insurance by the policy which do not happen to be applicable to the particular facts of this case. Condition 3 is applicable, however, and defeats Appellants' right to recover for loss of the airplane in this case.

Appellants then review the contentions made in their brief but we will not here repeat the reply made to these contentions in our brief. Concerning Appellants noting that the policy covered damage to the airplane caused by frost it should perhaps be noted that the airplane obviously was not damaged in any way by frost, but rather was damaged by the assured's affirmative action.

At page 6 Appellants commence the argument on their contention that the Washington Supreme Court has expressly repudiated any rule of literal construction of insurance contracts in an *en banc* decision re-

versing a departmental decision. This argument is based entirely on the case of *Port Blakely Mill Co. v. Springfield, Etc. Ins. Co.*, 59 Wash. 501, 110 Pac. 36. Appellants allude to the fact that this was an *en banc* decision as though there were some magic in that circumstance. It is true that it was decided *en banc* by a *six* man court by a *5 to 1* decision and overruled a 4 to 1 decision by the department of the court but Appellants overlook the fact that the *Isaacson Iron Works* case was also decided *en banc* by a *nine* man court by an *8 to 1* decision, and that appellants in the *Hamilton Trucking* case, which was decided unanimously by a 5 man department of the court didn't even ask for a rehearing *en banc.*

However decided, the fact is that the problem presented in that case *did not involve* an inquiry by the court as to the *meaning* of the words used in the policy. The problem was whether the words used had the *legal effect* of making the clause involved a *warranty* in the strict legal sense of being a condition precedent to the attachment of the policy and a breach of which would *forever void* the policy instead of a *condition* which would merely suspend coverage during the time that the provision of the policy was being breached.

The court pointed out that it is fundamental that courts cannot make contracts for the parties and must enforce such contracts as are made and that contracts should not be construed so as to work a forfeiture of *either party's rights.* The case obviously does not have the signification attributed to it by appellants.

Appellants say that this case is noteworthy for an-

other reason in that it refers to the principle "expressio unius est exclusio alterius" since Condition 9 of the policy in suit expressly provides that a breach of it will avoid the policy.

The case itself refutes this contention of Appellants. The court quoted a clause in the policy reading as follows:

> "In consideration of the reduced rate at which this policy is written it is expressly stipulated and made a condition of this contract that this Company shall be liable for no greater proportion of any loss than the amount hereby insured bears to 70% of the actual cash value of the property described herein at the time when said loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon."

The court then said:

> "The term 'made a condition of this contract' is probably equivalent to a stipulation that the contract shall be void if the condition is violated."

An examination of the briefs shows that a similar contention to that of Appellants was made by counsel in the following cases, based upon the *Port Blakely Mill Co.* case and rejected by the Supreme Court of Washington.

Reynolds v. Pacific Marine Ins. Co., 98 Wash. 362, 167 Pac. 745;

Koontz v. General Casualty Co., 162 Wash. 77, 297 Pac. 1081;

Eakle v. Hayes, 185 Wash. 520, 5 P.(2d) 1072;

Johnson v. Inland Empire Ins. Co., 155 Wash. 6, 283 Pac. 177.

Obviously, the language of the policy in suit "subject to the terms, conditions and limitations contained herein or endorsed hereon, as hereinafter set forth" is equivalent to a stipulation that "the contract shall be void if the condition is violated" under the very case cited by Appellants as authority. This becomes even more apparent when it is noted that Condition 9 relates to things which would occur *after* and are not related to the cause of loss.

Appellants state that the *Port Blakely Mill Co.* case was cited with approval by the Washington court three years after its *Isaacson Iron Works* decision in *Kane v. Order of United Com. Travelers*, 3 Wn.(2d) 355, 100 P.(2d) 1036. This is the quotation in the latter case which concerned the legal effect of the word "warranted" in the former:

> "In *Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 59 Wash. 501, 110 Pac. 36, 28 L.R.A. (N.S.) 596, this court stated:
>
> " 'The rule of construction must be that the word used is to be construed in its ordinary signification. The legal signification may have been understood by the insurance company when it employed this word, but in order to avail itself of such legal signification it must appear that the other contracting party also understood it'."

From pages 10 to 14, Appellants argue that the *Isaacson Iron Works* case is not controlling and does not support the view that there is a rule of literal construction of insurance contracts in the State of Washington.

Appellants' argument here, as elsewhere in their

petition for rehearing, is based upon the *fundamental misassumption* that the parties didn't intend the beginning language of Condition 3 to be *applicable* to the assured's operations or serve *any purpose whatsoever.* This language is as follows:

> "The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured * * *."

Appellants labor mightily to distinguish the *Isaacson Iron Works* case but it is *not distinguishable.* Appellants say *without citing any authority whatsoever* that the *Isaacson Iron Works* case dealt with a provision that was so plain, simple and unambiguous as to not be capable of being construed while this case deals with one that is. The two provisions themselves give the most ready answer to this argument. For the convenience of the court they are again set forth.

> "The Assured shall use due diligence and do and concur in doing all things reasonably practiable to avoid or diminish any loss of or damage to the property hereby insured. * * *
>
> "The Assured agrees to use due diligence and exercise reasonable care to avoid doing damage to the property of others."

They say the question there was not whether the provision should be "literally" construed but whether it should be entirely eliminated. *Do not Appellants here seek to eliminate the provision?*

The two clauses are as alike as they could possibly be. Each requires the Assured to act affirmatively; so as to not negligently damage the property of others

in the *Isaacson* case, and the property insured in this case. Neither clause attempts to regulate all conduct of the assured as suggested by Appellants. The language employed in each is similar to language employed in other policies before other courts which gave them the same meaning as the court did in the *Isaacson* case (Br. 18 to 30).

Appellants, p. 13, state that "so far as the record shows" the language relied on to exclude coverage in the *Isaacson Iron Works* case was in a part of the policy where one would expect to find such a provision and not buried among a number of general conditions dealing with other matters as was done here.

We have inspected the record in the *Isaacson Iron Works* case and we invite Appellants and the court to do so. We have quoted the insuring clause and the condition there involved in our brief at pages 19-20, and the fact is that the policy there had an insuring clause substantially the same as the one here involved and it was a clause found in the *general conditions* part of the policy, just as here, that defeated the right of the assured to recover.

Appellants' argument concerning the placement of the word "and" amounts to nothing more than saying that by making a minimum amount of change in the wording of the policy they think it could be made to read like they would like to have it read. As we have heretofore pointed out, the suggested change would make the clause clumsy and awkward and, in effect, *say the same thing twice.*

The court's conclusion that it must follow the *Isaac-*

son Iron Works case as *the trial court did* is *eminently correct.* It cannot be distinguished.

Appellants next argue, pages 14 to 19, that the cases cited in the *Isaacson Iron Works* case and decided since that case show that there is no rule of literal construction of insurance contracts in Washington in the sense that ambiguous contracts, the meaning of which is uncertain, will be read literally instead of as intended by the parties.

The citation to the cases cited in the *Isaacson Iron Works* case was as follows:

> "The burden rested upon respondent to show that the loss which it suffered comes within the terms of the policy; while, on the other hand, if the policy be ambiguous, such ambiguity should be construed in favor of the insured. *Maylon v. Ocean Accident & Guarantee Corp.*, 149 Wash. 70, 270 Pac. 96; *Ragley v. Northwestern Nat. Ins. Co.*, 151 Wash. 545, 276 Pac. 537; *Brown v. Northwestern Mutual Fire Assn.*, 176 Wash. 695, 30 P.(2d) 640."

The *holding* of the *Isaacson Iron Works* case was that the court would not, despite the quoted rule, create an ambiguity where none existed and then construe the policy in favor of the insured.

The fact that the Washington court will resort to construction to find the intention of the parties when the meaning of the words they have used in their contract is uncertain, *does not mean* that the court does not follow what *might be called* "a 'literal' rule of construction of insurance policies." In reading policies

that are not ambiguous or uncertain of meaning, *literally*, and in being slow to find ambiguity even though by so doing they might help out some assured at the expense of an insurance company, it may be said that they do follow such a rule.

We cannot escape the feeling that what Appellants have done is to separate one sentence from the context of the court's opinion, set up a meaning for it that was not intended for it by the court and which the ordinary reader would not get from it and then proceed to knock over the bogey man represented in their wrong impression and which exists only in their own minds.

Appellants have cited no case which is *in any way inconsistent* with the holding of this court or the cited cases from the Washington Court or which in *any way subtracts* from the holding of this or the cited cases.

The first case cited by Appellants is *Maylon v. Ocean Accident & Guaranty Corp.*, 149 Wash. 70, 270 Pac. 96. The court there affirms the rule of the *Isaacson* case, as follows:

> "Appellant cites many authorities; but, by reason of the difference of the wording of the policies, we think none is in point here beyond the general holding—which we do not dispute—that, when the terms of a policy are clear and unambiguous they must be given force and effect."

The next case cited is *Ragley v. Southwestern Nat. Ins. Co.*, 151 Wash. 545, 276 Pac. 537. This was a suit on a fire policy on a house providing insurance "while occupied only for dwelling house purposes." The court pointed out that the quoted clause was not capable

of any very exact meaning in view of the great variety of uses that may be made of a dwelling house and approved an instruction given to the jury concerning the provision on the basis of substantial evidence submitted that the house was used for "dwelling house purposes."

The next case cited is *Brown v. Northwestern Mutual Fire Assn.*, 176 Wash. 693, 30 P.(2d) 640, and the court merely held that no change had taken place "in the interest, title or possession of the subject of insurance" under a policy which insured the mortgagor, conditional vendor and conditional vendee of property where the conditional vendee had defaulted and the conditional vendor had commenced an action to declare his interest in the property forfeited.

The next case cited is *Kane v. Order of United Com. Travelers*, 3 Wn.(2d) 355, 100 P.(2d) 1036. Appellants quote from this case to the effect that where a policy is *fairly* susceptible of two constructions, a meaning favorable to the assured will be implied, but neglects to quote what immediately followed their quotation in the opinion which affirms the rule of the *Issacson Iron Works* case as follows:

> "On the other hand, that rule is applied only where there is an unexplained ambiguity in the contract. *Miller v. Penn Mutual Ins. Co.*, 189 Wash. 269, 64 P.(2d) 1052."

The next case cited by Appellants is *Jack v. Standard Marine Ins. Co.*, 33 Wn.(2d) 265, 205 P.(2d) 251. The question in that case was whether there had been an "upset or overturning" of the *crane and clamshell bucket* rather than the *tractor* to which they were at-

tached as intimated by Appellants, and the court held that there had been, when the crane was elevated beyond its center of gravity, lost its equilibrium and fell over backwards.

The next case cited by Appellants is *Handley v. Oakley*, 10 Wn.(2d) 396, 116 P.(2d) 833. The rule of the *Isaacson Iron Works* case was there affirmed as follows:

> "Appellant finally contends that a policy of insurance must be strictly construed against the insurance company, and liberally in favor of one to be afforded protection by it. In discussing this rule in *Green v. National Casualty Co.*, 87 Wash. 237, 151 Pac. 509, we stated:
>
> " 'In thus construing the policy, we are not unmindful of the rule that policies of insurance are construed in favor of the insured and most strongly against the insurance companies. *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 82 Pac. 113, 4 L.R.A. (N.S.) 636. But this rule should not be permitted to have the effect to make a plain agreement ambiguous and then interpret it in favor of the insured. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous their terms are to be taken and understood in their plain and ordinary meaning.'
>
> "In the instant case, we do not find the provisions of the policy ambiguous or difficult of comprehension and therefore there is no necessity for the application of the rule."

The next case cited by Appellants is *Doke v. United Pac. Ins. Co.*, 15 Wn.(2d) 536, 131 P.(2d) 436. This

was a suit on an accident policy covering a national guardsman against accidental injury "caused by service classified as incurred in the line of duty." The policy didn't define this language and the court had to ascertain what the parties meant thereby.

Appellants next argue, pages 19 to 21, that the case of *Hamilton Trucking Service, Inc. v. Automobile Ins. Co.*, 39 Wn.(2d) 688, 237 P.(2d) 781, has no controlling effect in this case and does not indicate in any way that there is a "literal" rule of construction of insurance policies in the State of Washington.

Appellants state that this court, in summarizing that decision, did not refer to the "most significant provision in the insurance policy actually before the court that governed the holding which it announced." This was undoubtedly for the reason that this court read that decision correctly instead of as Appellants read it. It is true that the assured there contended he had insurance under two clauses of the policy—one providing insurance of the load upon colliding with an object due to overwidth or overheight of the load and the other providing insurance against "accidental collision of the motor truck or trailer with any other automobile, vehicle or object." The court disposed of the first contention summarily on the ground that the evidence undisputably showed the load was not overheight and the rest of the opinion, which constituted most of what the court said, was devoted to the question of whether the loss came within the other clause providing insurance against "accidental collision of

the motor truck or trailer with any other automobile, vehicle or object."

Appellants attempt to distinguish the *Hamilton Trucking* case by stating "the policy in that case presented no question as to the construction of a condition relied on to take away the coverage given by the insuring clause as is the case here." The fact is that the beginning broad language of the policy in the *Hamilton Trucking* case was cut down by a later provision in the policy specifying the perils insured. The beginning broad language indicated it would be cut down. So, in the case at bar, the beginning sentence of the policy specifies that the insurance is subject to "the terms, conditions and limitations" found later in policy. Both the broad language relied upon by Appellants and the limiting clauses of the policy are found later therein.

Appellants state that the Washington court's refusal to find ambiguity in the policy in the *Hamilton Trucking* case which seven other courts had found ambiguous must have influenced this court in inferring that the Washington court follows what might be called a "literal" rule of construction. Appellants make it clear that they *do not quarrel* with the holding in that case.

We submit that this court *should be influenced* by that decision in finding that the Washington court follows what *might* be called a "literal" rule of construction in the sense that it *steadfastly refuses to be stampeded into finding* ambiguity where *none exists*, despite the views of other courts, in order to aid some assured at the expense of some insurance company.

Argument in Answer to Appellants' Argument on Grounds 2 and 3 for Rehearing.

From pages 22 to 26 Appellants' present argument on their second ground for rehearing. Appellants assert that the court's treatment of Condition 3 is inconsistent with its treatment of Conditions 1 and 2. Our first impression on reading the court's opinion, from which we have not receded, was that the court had been *painfully* consistent.

Appellants' argument on this ground is largely a rehash of their former arguments, which we believe have been adequately answered. However, at page 24, Appellants' assert:

> "To reach the result contended for by Appellees and defeat recovery on the policy for breach of Condition 3, it is necessary to accept the broad, sweeping proposition which Appellees advance, that 'A breach of a Condition Material to the Risk Voids a Policy of Insurance' (Br. of Appellees, pp. 33 to 37). What Appellees really contend is that the same consequence would follow from breach of Condition 3 as would result from a breach of warranty.
>
> "The decision of this court would probably be construed as an implicit approval of that proposion. If so, the decision would constitute a most regrettable inovation in insurance law."

What Appellants have done is to quote the heading of our argument (Br. 33) rather than the argument (Br. 33-36). It is clear that our position is that where a breach of a condition is material to the risk *and a breach thereof exists at the time of the loss*, recovery may not be had on the policy. The authorities cited by

us were in support of the position taken in our argument rather than to the heading thereof. Appellants *have not at any time* cited any authority in support of *any different* theory of the law.

Appellants make no new argument on Ground 3 of their petition for rehearing and we, therefore, rest on our brief.

CONCLUSION

In conclusion, we respectfully submit that Appellants are merely shadow boxing with the portion of the court's opinion which is unfavorable to them in their argument on their petition for rehearing. Their argument, when fully analyzed, ends up by conceding that the cases from the Washington Supreme Court relied upon by this court in its opinion *accurately reflect the law of Washington.* In view of the many cases from that court, cited herein, they could not do otherwise. Rather than attempt to show that the cases relied upon do not accurately reflect the law, Appellants content themselves with attempting to refute some supposed rule of law which they assert the court pronounced and which they glean from one sentence of the court's opinion separated from its context.

We submit that the court's opinion is eminently correct and accurately portrays and applies the law of Washington to the facts of this case.

Respectfully submitted,

MACBRIDE, MATTHEWS & HANIFY,
Attorneys for Appellees.